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II.—SECARE PARTIS:

THE EARLY ROMAN LAW OF EXECUTION AGAINST A DEBTOR.

In ancient days, the way of the borrower was hard everywhere, but apparently nowhere so hard as in the Rome of the fifth century B. C., when, if the Twelve Tables really say what they have long been supposed to say, a duly adjudicated debtor, if he failed to pay the judgment or get it paid, might have been killed by his creditor or sold into foreign slavery, or, if there were several creditors, might have been cut into pieces by them in proportion to their shares.

That is drastic enough to satisfy Shylock, or the typical mortgagee of early American melodrama. And it is not merely cruel, but it becomes grotesque, when we note the provision that the dissecting creditors are not to be held too strictly to keep the due ratio of their conflicting claims. If the Romans at any stage of their development had such a law, they were less removed from savagery than their admirers have liked to believe. For that reason Renaissance scholars refused to believe it. Modern writers, on the other hand, have hastened with some heat to affirm their belief in it, lest they be accused of sentimentality in their historical attitude. Niebuhr, for example, was quite sure that even the attempt to question that interpretation was a sign of *Unwahrheit und Verkehrtheit*, "falsehood and perversity," on the part of the questioner.¹

We derive our information chiefly from Gellius, who represents Favorinus and Sextus Caecilius discussing the matter in detail in the first chapter of his 20th book. Caecilius gives first the substance, then the text, of the XII Tables (i, 43-45) regulating the process of executing judgment against a condemned debtor. There were first thirty days of grace, evidently—although the law does not say so—to give him an opportunity of getting the money due either from the sale of his property or from his friends. He might then be arrested by his credi-

¹ Niebuhr, *Röm. Gesch.* ii, 670. Cf. Puchta, *Institutionen*, ii, 179, Anm. n.

tor, and brought before the praetor, where he is adjudged to the custody of the creditor as an *addictus* and held straightly confined. Gellius goes on as follows:

Now, in the interval there was a privilege of compromising the claim, and unless a compromise was reached, debtors were kept in chains sixty days. Within these sixty days, they were brought to the comitium before the praetor three market days in succession (*trinīs nundinis continuis*), and public proclamation was made of the amount of the judgment. And on the third market day, they were capitally punished or were sold into foreign slavery across the Tiber. But (the legislators), as I have said, the better to establish the binding character of obligations, made this form of capital punishment a dreadful thing by a display of peculiar severity and by surrounding it with new terrors. For if there were more than one creditor to whom the debtor was adjudged, they permit the creditors to cut up and divide the body of the man so condemned. And indeed I shall cite the very words of the law, lest you suppose that I am seeking to avoid the odium of doing so. They are as follows: On the third market day, let them cut the parts. If they cut more or less, the law will not take account of it. (*Tertiis nundinis partis secanto: Si plus minusve secuerunt, se fraude esto.*)

Gellius goes on to argue that the very atrocity of this procedure proved that it was never meant to be taken seriously. He says very emphatically that he never heard or read of any man being so dealt with. And in this he is confirmed by all the other ancient writers who hold the same view of the meaning of these words — Quintilian,² Dio Cassius,³ Tertullian.⁴ All hasten to add that the provision was contrary to public feeling and that it quickly became obsolete.

What do the words *partis secanto* mean? Mr. Buckler in the Yorke Prize Essay, *Contract in Roman Law*, says,⁵ “We should a priori translate thus: ‘On the third market day, let the creditors cut up and divide the debtor’s body.’” I am not altogether sure that the translation is really a priori, and not rather a

² Quintilian, *Inst. Or.* 3, 6, 84, *sunt enim quaedam non laudabilia natura, sed iure concessa, ut in duodecim tabulis, debitoris corpus inter creditores dividi licuit, quam legem mos publicus repudiavit.*

³ Dio Cassius, *fr.* 17, 8.

⁴ Tertullian, *Apologet.* 4. *Sed et iudicatos retro in partes secari a creditoribus leges erant. Consensu tamen publico crudelitas postea erasa est et in pudoris notam capitis poena conversa. Bonorum adhibita proscriptio suffundere maluit hominis sanguinem quam effundere.*

⁵ Buckler, *Contract in Roman Law*, p. 49.

posteriori by some seventeen hundred years. That is, Mr. Buckler thinks that this is the first translation that would occur to him, because he knows how Gellius and the others understood it. However, most modern Romanists are in full agreement with Mr. Buckler, and it cannot be denied that their position is a strong one.

Yet the strength lies principally in one fact—in the age of this interpretation. It is as old as Quintilian. In Quintilian's time, commentaries on the XII Tables were still being vigorously written by lawyers, who treated the Decemviral legislation much as Magna Carta was treated by American and English lawyers in the last four centuries. Marcus Fabius is distinctly not to be despised from any point of view, but his judgment as to what Latin words meant that were written nearly five hundred years before he was born, is not infallible. If it were Livy or Cicero, the evidence would be measurably stronger, for the practise of memorizing the XII Tables was still extant in Cicero's boyhood—Cicero himself had learned them,⁶—but men had ceased to do so for a century and a half in Quintilian's time. We do not accept Quintilian's authority as conclusive as to a vexed passage in the Fourth Eclogue of Virgil.⁷ His opinion has great weight, but it is something less than final. And of course, what is said of him, applies with much greater force to Gellius, to Tertullian, to Dio Cassius. If we should reach the conclusion that *partis secanto* did not mean what they believed it meant, the fact of their opinion serves only to establish the inveterate character of the error.

There is one other element of strength in the prevailing opinion. That is, the weakness of the view that is generally advanced to replace it. There have always been those who understood *secare partis* as the division, not of the debtor's body, but of his property. The eminent Bynkershoekius so understood it in the 16th century,⁸ and the learned Burmannius⁹—we read—was properly exercised over the ineptitude of the

⁶ Cicero, De Legg. ii, 9, 59.

⁷ Vergil, Ecl. 4, 62. Quintilian, Inst. Or. 9, 3, 8.

⁸ Bynkershoek, Observat. jur. Rom. 1, 1.

⁹ Burmann, cited in Spalding's Quintilian, Inst. Or. 3, 6, 84.

temerarious Capperronerius who ventured to dispute the question with that great man—*quo ineptior videtur sedulitas Capperroneri tantum virum redarguere conantis*. Many others since that time have found the version of Gellius too hard to accept, but in most cases because they were loath to ascribe to their Romans so barbarous a practice.

Now, the seizure of a debtor's property to pay his debts is common to-day. It certainly happened very early in Roman legal history. Can *secare partis* have meant that? Mr. Buckler says emphatically "No";¹⁰ and he is a type of most modern investigators. "In ancient law," he tells us, "it was not the property of the debtor but his person that was responsible for his debts." Execution against the property we are to understand is always a later refinement.

That, however, is by no means so certain. It is a common practice among peoples we call primitive—and apparently was so in many parts of the world in ancient times—that a man whose property was kept from him might retaliate by entering the detainer's house and taking an equivalent amount by force from the latter. It is a form of the talion.¹¹ It is self-help—not a legal but a pre-legal procedure—but we know that law at first intends rather to limit and regulate occasions for self-help than to abolish them. There is consequently no general and theoretical objection to supposing that the parts here to be cut are chattels and not living bodies. But there is a special objection that seems to me conclusive. We find, as has been said, this form of talion in many places and times. We find execution against the person in various types of primitive law. But

¹⁰ Buckler, *Contract in Roman Law*, pp. 50-51.

¹¹ The talion in cases of bodily injury is sufficiently well-known. It is not so well known that in cases of theft, that is, the invasion of property-rights, retaliation in kind was permitted. The injured party was to help himself to an equal or larger part of the wrongdoer's goods. That is the case among the Maoris, the Malays, many Indian tribes of America, many African tribes and the Kirghizes. (Cf. the references in MacCulloch, *Crimes and Punishments* (Savage and Primitive), Hastings Enc. of Rel. and Ethics, iv, 256.) There is no difference in early Roman law between wrongs arising out of delict and out of breach of contract, and certainly none in the way of enforcing redress for these wrongs.

we do not find both. Now it is clear that by the XII Tables, the debtor is *addictus*—which is at least a qualified slavery—to the creditor, thirty days after judgment. That is to say, since he cannot pay, his body pays the debt in that his working capacity or his monetary value is seized in compensation, even if it is not used at once. But if this form of satisfaction is given, the claim is gone. There was no assessment of the man's value which was deductible from the total amount of his debts. There is accordingly no claim left to satisfy against the goods. If we must reject the commonly offered alternative for Gellius' interpretation, it will be for this reason, and not because execution against the property cannot possibly have been known as early as 450 B. C.

Other explanations have been urged. There is a characteristically contorted one offered by Voigt in his huge treatise on the XII Tables.¹² There are others of varying plausibility, which are all collected in Muirhead's Historical Introduction to the Private Law of Rome.¹³ But before suggesting one of these, or a new one, it might be well to note the difficulties in the usual view, quite apart from the sentimental considerations that may have moved the erudite Bynkershoekius and the ponderous Burmannius.

First of all, such a form of execution is practically unique. It is really found nowhere else. That this is not apparent at once is due principally to one fact. We think of Shylock's pound of flesh and are satisfied that in that we have a parallel to the practise legalized by the XII Tables. And since everyone knows the Merchant of Venice, the atrocity of cutting into a man's body in order to pay his debt, while shocking enough, does not seem altogether strange. Now, I take it hard that after Shakespeare has irremediably distorted our views of English history, he shall also be allowed to corrupt our law. Therefore I should like to emphasize the fact—obvious upon the least consideration—that Shylock's pound of flesh is not really like this procedure at all. The penalty he exacts is one that the parties have agreed to in advance. It is a matter of covenant. Such agreements have been made and enforced in many parts

¹² Voigt, *Zwölf Tafeln*, ii, 361.

¹³ Muirhead, *Hist. Introd.* (3rd ed. Goudy-Grant), pp. 187-194.

of the world. It has always been hard to convince an obligee that his obligor meant seriously to carry out the promise so glibly made. And among the many forms of security for this uncertain future occurrence, such penal stipulations are not infrequent. The eager promissor has pledged his dearest possessions, his liberty or his body, and upon default these pledges were doubtless savagely and ruthlessly exacted. But it is wholly unique that such a pledge was tacit in every contract, that a defaulting debtor, as such, was, or could be, cut into fragments to give his creditor what can have been only the most illusory of satisfactions.

That most learned, most short-tempered and most headstrong of jurists, Josef Kohler of Berlin, has collected a great number of parallels to *partis secanto*, in his extraordinary book, *Shakespeare vor dem Forum der Jurisprudenz*.¹⁴ But if we look at them closely, we shall find that they are practically all variants of the pound of flesh. They are instances of express stipulation. There is, however, one case that is not an instance of stipulation. In old Norse law,¹⁵ it seems, a creditor—a single creditor, be it noted—might seize his debtor and, if the man's kin would not ransom him, might strike off parts of his body, taking care not to imperil his life at once. That does seem like *partis secanto*, in Quintilian's sense. But the differences are marked and essential. If we omit the fact that it is a single creditor that has this privilege, we have still to note that this thing could be done only if the addict deliberately and persistently refused to work, and thereby gradually satisfy the debt. It has been held with much plausibility that this punishment of a recalcitrant debtor was simply the right of castigation that a Norse master had generally over his slaves—a right that extended to killing them. An addict is not quite a slave, but as far as his subjection to the power of his creditor is concerned, is very much like a slave. But even if that should not be so, the Norse practise has quite different presuppositions. It assumes a subsidiary liability for each individual on the part of the kin. That has often been asserted for Roman society, but there is not the slightest evi-

¹⁴ Kohler, *Shakespeare vor dem Forum der Jurispr.* pp. 8 sq.; *id.* *Das Recht als Kulturerscheinung*, p. 17.

¹⁵ Kohler, *Shakespeare, etc.*, pp. 30 sq.

dence that it ever existed. And again, it is after all merely an example of forcing the payment of ransom by methods used among pirates and highwaymen from time immemorial. It is quite natural to find it in a Viking society. But for Rome, these presuppositions fail. There is no clan or family liability. Nor could the dismemberment have served the purpose of putting pressure on the addict's kin. There is nothing to show that at Rome he could be ransomed as a matter of right, even if his kinsmen wished to do so. The very contrary appears. It is stated that vindication may take place any time within the thirty days of grace, the *triginta dies iusti*. At the end of that period, he becomes addict to the creditor, and then apparently the matter is one exclusively for adjustment between the two. If no adjustment takes place, the creditor may turn the quasi-slavery of addiction into a real slavery—or if we follow the usual interpretation, may kill the debtor—at any time within sixty days. This however is subject to the proviso of due public notice of such an intention, by three successive announcements. Evidently the public proclamation at the market day serves the same purpose as modern recording acts. If the sixty days expire without such notice of intention, we must infer that the creditor has lost, by his laches, the power of acquiring property in the person of his debtor. Accordingly, the Norse custom, which is the only close parallel, does not after all explain what *partis secanto* means. Whatever it does mean, it is something quite different from what was done in Norway.

If the first difficulty with taking the words as Quintilian took them is that the practice is wholly anomalous, a second difficulty is that it involves an act profoundly at variance with Roman ideas. Mutilation as a part of ritual was common in Western Asia, somewhat less common in Greece, and so extremely rare in ancient Rome that it is practically non-existent.¹⁶ Bodily disfigurement, as such, produced in Roman minds a horror which it is difficult for us to follow sympathetically. We may remember the shudder of repulsion with which the great-hearted Aeneas observed the unmerited disgrace of his friend and kinsman.¹⁷ In later imperial times, when with the Severan dynasty

¹⁶ Mommsen, *Röm. Strafrecht*, pp. 980 sq.

¹⁷ Vergil, *Aen.* vi, 494-499.

Rome became more and more orientalized, bodily mutilation became frequent as punishment.¹⁸ But early Rome knew nothing of it, except as a military punishment for deserters and camp thieves.¹⁹ The provision in the Twelve Tables as to bodily injury, *si membrum rupsit . . . talio esto*, I think, makes it clear that mutilation, as a regular form of punishment, was unheard of. An injury resulting in the loss of any part of the body, whether the injury was wilful or accidental, permitted talion, just as talion is permitted in Leviticus, eye for eye, limb for limb and tooth for tooth.²⁰ That was not due to the actual amount of wrong done. The breaking of a limb, which did not result in actual dismemberment, allowed no talion. And yet it is clear that this latter injury might be vastly more serious than, let us say, the loss of portion of an ear. It was the character of the injury and the intense religious shock it gave Romans that is controlling. We need not stop to inquire into the nature of the religious ideas at the bottom of this feeling. Talion was allowed in all cases of mutilation, intentional or not, great or small, because of the exceptional character of this wrong, and the consequent feeling that, unless the victim consented to composition, nothing but putting the wrong-doer and the wronged upon an exact par, could possibly be adequate.

Nor can the *sectio* we have been discussing, be understood as a form of talion. Logically talion under such cases ought to be what we are told this was not, namely, execution against the property. Loss of goods is not paralleled by loss of portions of the body.

Accordingly, what Quintilian supposed the Twelve Tables to say, is something unique, not only in the Roman legal system of any period, but in legal systems generally; and is further an act which would have violently shocked the religious—or superstitious—prejudices of the time.

The next objection to the common view of *partis secanto* is one that must be offered with hesitation and urged with diffi-

¹⁸ Mommsen, Röm. Strafrecht, p. 982. Augustinus, Ep. 133 (p. 396 M.). Justinian, Novellae, 42, 1, 2.

¹⁹ Mommsen, *ibid.* Val. Max. 2, 7, 12. Livy, 23, 33, 1. Frontinus, Strat. 4, 1, 16.

²⁰ Leviticus, 24, 17-22. Exod. 21, 23-25. Deut. 19, 19-21.

dence. It is the *argumentum ex silentio*. Quintilian is the first of extant writers to give this meaning to these words. But for five hundred years before Quintilian, the provision was known and we have no inconsiderable records of Roman history of that period. Apparently no one thinks this most extraordinary statute worth mentioning. Now, mere silence is dubious evidence of anything. Yet even in the Anglo-American system of law in which it is particularly condemned, it is not wholly without probative force.²¹ Where the circumstances are such that a fact, if it existed, would almost surely have been mentioned, a failure to mention it may be considered with other facts, in order to determine whether it really existed. And such circumstances are to be found. For example, Livy (6, 11), writing a century before Quintilian, ascribes to Marcus Manlius the words, *acriores quippe aeris alieni stimulos esse, qui non egestatem modo atque ignominiam minentur, sed nervo ac vinculis corpus liberum terrent*. Manlius is represented as stirring up the needy populace, by inveighing against the ferocious law of debt. He uses words which seem to refer to the Twelve Tables directly. Would he have omitted this much more horrible thing that threatened the *corpus liberum*? Again in 6, 31, another plebeian agitator denounces the virtual slavery of the Roman debtor. This would have been an excellent occasion to refer to the savage privilege of patrician creditors. But Livy does not mention it.

Livy has left us a relatively large body of writings in the course of which the Twelve Tables are described in detail and often alluded to.²² Cicero also, in the generation before Livy, has frequent occasion to mention debts and execution and Roman institutions, as well as the Twelve Tables particularly. He was a lawyer and a good one—and he had known the Twelve Tables by heart since boyhood. It is hard to believe that, if Livy and Cicero had understood the Twelve Tables in this sense, their silence is accidental. Either they concealed the fact, or the provision was repealed so early that it did not seem worthy of men-

²¹ Cf. Jones on Evidence (2nd ed.), sec. 289. Chase-Stephens, Digest of Law of Evidence, pp. 25, 72, 75. Wigmore on Evidence, I, sec. 160: State vs. Delaney, 92 Iowa 467.

²² Livy, ii, 34-57.

tion. It is clear that any motive for concealment would go far to rebut any possible presumption from their silence. And it is not to be denied that patriotic men in a time of advanced moral feeling might have wished to suppress a discreditable and obsolete institution of their ancestors. But the Twelve Tables could not be suppressed. Everybody knew them or could know them. Anti-Roman Greek writers, of whom there were not few, would eagerly have seized upon this provision to establish the essential barbarity of Romans, and men like Livy and Cicero would have been forced to offer some defense. Livy himself, distinctly an apologete, often enough mentions ancient and discreditable things and explains them. There were so many pleas possible. The age of the decemvirs was a hard and rude one. There was the wicked decemvir—that much maligned democrat Appius Claudius—on whom it could be foisted. There was the perhaps evil influence of the Asiatic Greek, Hermodorus of Ephesus. All these things could be offered in extenuation.

Livy does not hesitate to speak of human sacrifices at Rome—*mos minime Romanus*, he calls it, but he does not seek to kill it by silence.²³ He tells us of that bad business in Henna during the Second Punic war²⁴—with reluctance and exculpation to be sure, but still with the uneasy consciousness that he has not quite explained it. His epitomator, Florus, states how Aquilius captured several cities by poisoning their water supply, which draws from him the cry *nefas!*, and he goes on, *quæ res ut maturam ita infamem fecit victoriam quippe cum contra fas deum moresque maiorum . . . Romana arma violasset*.²⁵ No, Roman writers do not uniformly neglect to notice barbarities which their people had outgrown. And where the thing was so striking and so unique, so certain to have been made the topic of hostile criticism, the silence of five hundred years is hard to understand.

Poets perhaps are not competent witnesses in matters like this, but saving an exception by the defense, we might cite the verse of Ennius

cum nihil horridius umquam lex ulla iuberet

²³ Livy, xxii, 57, 6.

²⁴ Livy, xxiv, 39.

²⁵ Florus, Ep. T. Liv., xxxv.

of the burying alive of the Vestal Minucia.²⁶ Could he have said that, with this provision in mind? And Ennius in 200 B. C. must have known the Twelve Tables as a living code. He must have fully discussed them in his *Annales*, and his contemporary and friend Sextus Aelius had written an exhaustive and authoritative commentary on them.

Even the late writers who follow Quintilian, one of whom, Tertullian, has no reason for being tender of the reputation of long dead pagans, add that there was neither record nor tradition of any debtor having actually been dismembered. That is itself a remarkable fact. For example, the Twelve Tables forbade connubium between patricians and plebeians. Cicero mentions this with indignation, but adds that it was soon repealed—as we know it was—by the *lex Canuleia*.²⁷ Romans, like Englishmen, tolerated outworn anomalies in their law, but like Englishmen, they sooner or later repealed them. Apparently *secare partis* was never repealed, although other forms of execution grew up. Yet, except as repealed, the Twelve Tables were still law in the early empire. The abrogation of a specific statute by desuetude is called theoretically possible in the imperial period,²⁸ but it was never a ready doctrine for Roman lawyers, and until Julian, would probably have been disputed.

The strongest argument, accordingly, in favor of the accepted view is the statement of Quintilian. If, in addition, we had a *prima facie* case, if—that is, as Mr. Buckler says—the literal meaning of the words really was that the “creditors were to cut up and divide the debtor’s body,” little weight could be attached to most of what I have urged in the previous pages. But that precisely is not the case. All we read is *tertiis undinis partis secanto*. The words ‘body of the debtor’ are not there. They are supplied by the very interpretation here questioned. Not only that, but the little word ‘in’ is surreptitiously introduced. Gellius and modern writers quote the phrase in the form given, but when they discuss it they cite it as though it read *in partis*. It is possible that *secare partis alicuius rei* is the same as *secare aliquam rem in partis*; but there is no

²⁶ Ennius, *Annales*, V. (Orosius, 3, 9, 5.)

²⁷ Cicero, *De Rep.* ii, 37, 63.

²⁸ Julian, *Dig.* 1, 3, 32, 1.

other instance in Latin, as far as I can find, of such an expression.

There is therefore no *prima facie* case which Quintilian's authority could confirm. On the contrary, *prima facie*, we should say that whatever *secare partis* does mean, it means something different from *secare aliquam rem in partis*.

The word *secare* was used in Roman law and literature in quite another connection, in the phrases *bonorum sector*, *bonorum sectio* and the like. The meaning is so different that Pseudo-Asconius,²⁹ Festus³⁰ and Nonius³¹ derive these terms from *sequor* and not at all from *secare*. In that they were probably wrong, but there is no real doubt what *sector* and *sectio* meant in these phrases. They referred to the public sale of property under certain special circumstances. Not only that, but the word *bonorum* was often omitted, so that *sectio* and *sector* are frequently found alone in this technical, but very familiar, sense.³²

It is not a novel hypothesis that *secare* in the Twelve Tables refers to this practise of *bonorum sectio*, but except by Voigt, who thinks that the passage dealt with the claims of co-heirs, the details of *bonorum sectio* seem not to have been considered. Some seem to have confused *sectio*, in this sense, with the ordinary private sale of property at auction. It was not that. It was the public sale of public property.

Property came into the hands of the state in two ways; as booty captured in war, and by confiscation. Except lands of a conquered community, the state neither did, nor could, use the goods so acquired, but sold them. The proper officer, the quaestor, either sold them at auction in separate items, or he could transfer to the highest bidders the right to sell them. That was far the more convenient method, and closely resembled the Roman method of farming the taxes. The bidders in these sales were called the *sectores*.

To us, there seems no difference in these two methods. In

²⁹ Pseudo-Asconius in Verr. ii, 1, 52.

³⁰ Festus, sub voce *Sectores* (Pauli Ep. p. 337 M.).

³¹ Nonius, p. 404 M., s. v. *secare*.

³² Cf. the very full information in Darem-Saglio, *Diction. des Ant.*, s. v. *hasta*, iii, 42 sq., and s. v. *lex*, iii, 1154 a.

any case the state sold the property. It was no concern of the public what disposition the purchaser made of his acquisition—whether he resold it or kept it. But it was not so at Rome. The *sectores* did not buy the goods at all. They merely bought the right to sell them. They never acquired the title at all. At law, they never owned them.

Passing of title, which to laymen seems a ludicrously simple thing, is profoundly difficult in early systems of law. For a certain class of objects, it involved a complicated ritual at Roman law, of which we know the details very well—the ritual of mancipation. The state's officers could scarcely mancipate separately every article capable of that method of transfer, and make title to every one of the others by the appropriate method, to-wit, actual tradition or delivery. And yet the *sectores* must be able to convey a good title to the sub-purchaser. The difficulty was avoided by treating the *sectores* as something like public officers, who transferred title in the name of the state, but were themselves responsible to the state for the price at which they had bid in the *sectio*. The *sectores*, we are expressly told, speculated in the price.

When a debtor was duly condemned, he became the *addictus* of the creditor, and was kept by him in a private prison. Addiction did not make a slave of him. In fact it does not seem to have given the creditor the right to use his services except for compensation, which would doubtless be deducted from the amount of the debt. That appears to me to be the inevitable inference from the provisions concerning his alimentation during this period. The debtor might live at his own expense. However, if he did not, or could not, provide his own food, the creditor must supply it, to the amount of a pound of grain daily or more. It is hardly to be supposed that if the creditor was compelled to do so, he could not add the amount to the claim.³³

Addiction, then, was a preliminary detention, the evils of which might induce a solvent debtor to secure payment of the judgment, but which could not of itself be a satisfactory method for the creditor. But the *addictio* could be turned into a real

³³ XII Tab. iii, 4. Si volet, suo vivito.

servitus, by triple proclamation on successive market days that the creditor intended to do so. After the third proclamation, the *addictus* became practically a slave, in that the creditor could sell him, and pass a good title to a foreigner, although apparently he could not be sold to a Roman. The civil personality, the *caput* of the debtor, was destroyed. That seems a better way of understanding *capite poenas dabant* than that the debtor was incontinently killed.

Of course, the triple proclamation had as its chief purpose the giving of public notice that a *sectio* would take place, so that prospective speculators might assemble. But, such a serious matter as the turning of a free man into a chattel, with the consequences that it entailed, would necessarily require notice. We should secure this notice by registration under recording acts. The Romans had this triple proclamation instead. And it is not exceptional that the creditor could not himself treat the *addictus* as a slave thereafter, but had merely a power of sale. Essentially that is all that a pledgee-creditor had, in the absence of a *lex commissoria*, which was always frowned upon by law, and sometimes forbidden. Finally, the fact that the power was limited to selling him into foreign slavery is not surprising. It was decidedly against public policy that a Roman should have other Romans as his chattels, and it was probably felt to be more offensive in the time of the Twelve Tables than it was later, because at that time the community was smaller and the consequences more immediately apparent.

We know what happened in a criminal trial. The convicted man was executed or banished, and his property was confiscated. It became *bona publica* and was sold as such. We have a direct statement that it was sold under a *sectio*.³⁴ But we must remember that there is essentially no difference between a civil and a criminal trial. Both resulted in either a *condemnatio* or an *absolutio*. If therefore a debtor lost his *caput* as the

³⁴ Varro, De R. R. ii, 10, 4, citing among the many ways of acquiring title, *tumve cum in bonis sectioneve cuius publice veniit*. This is given as an altogether distinct method from the ordinary sale of booty or confiscated property by the state directly. Possession so acquired was protected by a special interdict, the *interdictum sectorium*, Gaius, 4, 146.

ultimate result of a civil trial, it cannot have had other incidents than the loss of *caput* as a result of a criminal trial. His property, whatever it was, became *bona publica*. It could not pass to his heirs. The only alternative to confiscation would be that it became *res sine domino*, and for that, there is no evidence at all.

As between the state and the creditor, there could be little question. The claim of the creditor had been extinguished by the addiction of the debtor, and the ultimate consequences of the addiction—the sale of the man—had reimbursed the creditor, at least in part, and perhaps overpaid him. He certainly had no claim on this property. And the fact that the debtor was insolvent need not mean—it generally did not mean—that he was quite destitute. We have noted that it was contemplated that he might provide for his own support during addiction. He might have not inconsiderable property, but if it was one farthing less than his debt, he was insolvent. The debt was a unit, as is shown by the fact that *plus* or *minus petitio* was equally fatal at this time, and long afterward.³⁵ Similarly, if the debtor owed a specific thing, and could not pay in kind, he was insolvent, however much he may have had in general property. We are therefore dealing with amounts that are not negligible, and that might afford opportunities for profit to speculators.

It may shock us somewhat that the state should derive large revenues from suits at law. But that was quite in accord with Roman practise at this time. The commonest form of legislation was the *legis actio sacramento*.³⁶ In that, in every case, whether the plaintiff or the defendant won, the sum of five hundred *asses* was forfeited to the state. Historians are sometimes inclined to consider this a small sum, but at the period of which we are speaking, it was a large one. When the *as* was the libral *as*, it meant five hundred pounds of copper or bronze. By these very Twelve Tables, three hundred *asses* are fixed as the compensation for the breaking of the limb of a free man.³⁷

³⁵ Gaius, 4, 53-54, Just. Inst. 4, 6. Cf. Girard, *Manuel de Droit Rom.* pp. 1037 sq.

³⁶ Gaius 4, 13.

³⁷ XII Tab. viii, 2.

By the *lex Aternia* of approximately the same time,³⁸ ten *asses* are given as the equivalent of a sheep, and one hundred *asses* as that of an ox. In other words, from most law-suits, the state derived a revenue amounting to fifty sheep or five oxen. And these were law-suits which would never come to *manus iniunctionem*. It is not strange, therefore, that in suits that began or ended in *manus iniunctionem*, the state would also claim its considerable perquisites.

The *addictus* loses his *caput*; his property becomes *bona publica*; by triple proclamation bids are solicited, and the *sectores* whose bid was the highest dispose of the property in larger or smaller lots to purchasers. If we must find a translation for *partis secanto*, it will be "let the *sectores* retail the separate parts." In this rendering we may note that we are using a word "retail," which is derived from a root meaning "to cut."

Now, we can see what *si plus minusve secuerunt, se fraude esto* means. It is not the grisly jest that Shakespeare has familiarized us with. If the *sectores* got more or less for the retailing than they had bid for the *solidum*, that is not to be the basis for a claim either by them against the state, or by the state against them. It was necessary to provide that, since, technically, the *sectores* are not the owners of the goods, but are acting as public agents, or sub-officials of the quaestor who had the matter in charge. They are reminded by statute that there was no *locus poenitentiae*, if their speculation went wrong. Doubtless as in the case of the publicans generally, a peculiarly unfortunate speculation might result in having their debt to the state forgiven in whole or in part, but that was always a matter of grace.

If we accept this version, the sudden plural of *secanto* is easily intelligible. Until the phrase occurs, there has been talk of a single creditor. Without warning, a plurality of creditors are introduced, and apparently, the detailed discussion of what occurs, is concerned only with them. We are reduced to supposing that full details were given *in extenso* in regard to a single creditor, in a passage that has not come down to us, and

³⁸ Aulus Gellius, xi, 1, 2. Dion. Hal. x, 48-50. According to Festus the provisions mentioned were found in the *Lex Menenia-Sestia* of 452 B. C. (Festus s. v. *peculatus*.)

that these details were repeated when several creditors were referred to. But much more serious and practically important conflicts were sure to arise long before it got to execution. Who had the custody of the debtor at addition? Apparently that is not provided for at all in the Twelve Tables. Yet it seemed to be a matter of capital importance in Roman Law to prevent collusion between the debtor and one of several creditors.³⁹ And if the ancient code did not specifically mention it, it is not likely that it regulated with some minuteness what would happen in the rare case that several creditors had a judgment to execute, and only the body of a dead man to execute it against.

The old explanation was sanguinary, but picturesque. The hypothesis here suggested is dull and technical. But we may recall that laws do not become less technical as we trace them back in time, but more so. *Secare partis*, as I should like to render it, is intelligible and has close analogues in Roman legal history. In the accepted opinion, it is *res ridiculae atrocitatis*; ⁴⁰ it has no real parallels anywhere; it contradicts fundamental Roman psychology and is, after all, only an interpretation by writers five hundred years later than the Tables. If we needed to be convinced that Quintilian's views in such matters are not final, we may recall that all modern scholars take the *malum carmen* of the Twelve Tables to be a magical incantation. That seems in the highest degree probable. But practically all ancient writers, including Cicero ⁴¹—an infinitely better authority on this point than Quintilian—thought it meant a libel or pasquinade.

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³⁹ Girard, Man. 1045 sq. Cf. especially Dig. 42, 3 and 42, 7. Great precautions were taken to prevent fraud on the part of the debtor by collusion with one or more of his creditors. Dig. 42, 8.

⁴⁰ Gellius, xx, 1, 18.

⁴¹ XII Tab. viii, 1, qui malum carmen incantassit. Cicero de Rep. 4, 10, 12.